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Torts

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TORTS

SINCE the word "tort" is a term applied to a miscellaneous and more or less unconnected group of civil wrongs amounting to socially unreasonable conduct, division of the subject into smaller topics lends itself to better understanding of the major decisions of the past year. Therefore consideration of the significant cases of 1954 will be treated under the following topics: Assumption of Risk, Negligence-Standard of Care, Intentional Infliction of Mental Anguish, Misrepresentation, Conversion, Negligence, and Contributory Negligence as a Defense. Primary emphasis is placed on whether a particular decision modifies or enlarges previous case law on the point, whether the decision follows the so-called "majority rule," and the degree to which the rule evidenced by the decision is limited to the precise facts involved in the case.

ASSUMPTION OF RISK

The defense of assumption of risk rests on the plaintiff's consent to take his chances on ordinary risks of harm created by the defendant. Technically, in a true assumption of risk case, the defendant is not negligent at all for he simply owes no duty to the plaintiff. The plaintiff may be using great care himself and be denied recovery when he enters into performance in the face of a known and appreciated danger with a reasonable alternative available to him. The common law rule was that an employee assumed all of the ordinary risks of his employment, as well as the risk of any extraordinarily dangerous conditions known or obvious to him and against which he does not protest.¹ Most American and English writers have vigorously attacked this view,² protesting that the only reasonable alternative available in most cases is to quit work and look for another job. Criticism of the doctrine culminated in passage of the many workmen's compensation acts and the ultimate adoption of the Federal Employer's Liability Act,³ the latter greatly modifying the defense of assumption of risk which was previously available to the employer. In

¹ *Butler v. Frazee*, 211 U.S. 459 (1908).

² 3 LABATT, *MASTER AND SERVANT* § 960 (2d ed. 1913), for example.

³ 45 U.S.C. § 51.

the face of the tide, however, assumption of risk has a staunch defender in the personage of the Texas Supreme Court. In *McKee v. Patterson*⁴ a carpenter slipped on a slick floor in a school gym and injured himself. Although the general contractor was negligent in finishing the floor before completion of the carpentry work, the court held the contractor was not liable to the carpenter, either on the basis that the latter had assumed the risk or that the contractor owed no duty to the carpenter.⁵ In holding the carpenter had a reasonable alternative open, the court stated the need for employment was "not such economic compulsion as to render involuntary the workman's employment in the face of a known danger." Although adhering to common law precedent, the court was careful to point out that the carpenter had previously collected under the local workmen's compensation statute. Perhaps the court felt that one recovery was enough.

Closely allied to the assumption of risk cases are the so-called "rescue" cases. Those who rush in to save the life or property of another have not assumed the risk if the only reasonable alternative is to allow the damage to be done. It has long been held that efforts to protect the personal safety of another person will not supercede the defendant's liability, regardless of whether the rescuer is to be regarded as a foreseeable intervening force. To quote Mr. Justice Cardozo, "Danger invites rescue . . . the emergency begets the man."⁶ The Oklahoma court recently had occasion to approve the language of Cardozo in *Curtis v. Shell Pipe Line Corp.*⁷ The defendant dug a ditch on the plaintiff's land under a right-of-way agreement, but negligently left the ditch unguarded. The plaintiff's cow fell into the ditch, and the plaintiff suffered injuries in attempting to extricate the panic-stricken cow. The court held the owner of the cow could recover for his injuries sustained while trying to get the cow out and minimize the damages, so long as he was not negligent himself. No effort was made to persuade

⁴ _____Tex., 271 S.W. 2d 391 (1954).

⁵ For a distinction between assumption of risk and contributory negligence in Texas, see 29 TEXAS L. REV. 268, which suggests assumption of risk only applies in the master-servant relation. All else comes under the rule that no duty is owed to someone where the danger is open and obvious. Query, under the technical idea of assumption of risk, are not the two synonymous?

⁶ *Wagner v. International R. Co.*, 232 N.Y. 176, 133 N.E. 437 (1921).

⁷ _____Okla., 265 P. 2d 488 (1954).

the court that there may be a distinction between trying to rescue a person and trying to save only a chattel. Some states, including Texas, insist that a person trying to rescue property may not recover for any injuries sustained in the attempt, for his act is considered an intervening act relieving the defendant of liability. This illogical distinction has been discarded by most courts. The better view was aptly stated by Judge Andrews in *Wardrop v. Santi Moving Co.*⁸ that "undoubtedly more risks may be taken to protect life than to protect property without involving the imputation of negligence, but a reasonable effort may be made even in the latter case."

NEGLIGENCE—STANDARD OF CARE

Generally, in a negligence suit a doctor is entitled to be judged according to the standards of the school of medical thought which he professes to follow.⁹ In *Porter v. Puryear*¹⁰ the Texas court held that "[a]patient has no cause of action against his doctor for malpractice unless he proves by a doctor of the same school of practice that a diagnosis or treatment was negligent and the proximate cause." This concept of expert testimony was broadened to include testimony from a doctor from a different school of practice "where the particular subject of inquiry is common to and equally recognized and developed in all fields of practice and where it relates to the manner of use of electrical or mechanical appliances in common use in all fields of practice." This means, for example, that an X-ray technician may now be an expert witness against a doctor in a malpractice suit. Other states generally allow expert testimony of physicians of other schools or experts in other lines when that testimony bears on a point as to which the principles of the two schools concur (diagnosis, dangers of X-rays, etc.).¹¹

INTENTIONAL INFLICTION OF MENTAL ANGUISH

It is only in comparatively recent years that courts have recognized the intentional infliction of mental disturbance as a tort.

⁸ 233 N.Y. 227, 135 N.E. 272 (1922).

⁹ *Cook v. Moats*, 121 Neb. 769, 238 N.W. 529 (1931).

¹⁰ _____ Tex. _____, 262 S.W. 2d 933 (1954).

¹¹ See collection of cases in 41 Am. Jur., Physicians and Surgeons § 130.

Usually only acts of flagrant nature are compensated. One reason is that the courts are afraid of opening a "wide door" through which a stream of litigation will flow. Another is that frequently there is trouble in arriving at the correct amount of damages. However, large sums have been awarded for mental suffering when accompanied by a broken neck or back or leg, and the problem of proof of damage for the mental suffering has not been overly vexatious. Some courts have looked for technical batteries, or false imprisonment, or "impact." Others have faced the issue squarely and held the defendant liable for infliction of mental disturbance alone.¹² Texas showed an early tendency to allow recovery for this type of injury when the defendant struck a third person and negligently inflicted mental suffering on the plaintiff.¹³ However, in the "finance company cases," as recently as 1953 the court held there could be no cause of action for intentional infliction of mental suffering alone.¹⁴ The court simply was afraid of fraud. But the Texas court did an about-face in 1954 in *Duty v. General Finance Co., et al.*,¹⁵ which involved a suit by borrowers for mental anguish and injuries caused by a finance company's daily telephone calls, accusations in the presence of neighbors that the plaintiffs were deadbeats, threats to cause the plaintiffs to lose their jobs, requests to the plaintiffs' employer to make them pay, flooding the mail with letters and telegrams, etc. The only injuries sustained were headaches, upset stomachs, loss of weight and sleep. The court held that a cause of action existed, distinguishing earlier cases wherein no physical injuries were alleged.

The Retail Merchant's Association of Texas as amicus curiae feared that the decision would hamper banks, department stores, professional men, etc., in the collection of debts. In an attempt to placate them, the court intimated that liability would be limited to outrageous conduct. Only a "resort to every cruel device which his cunning can invent in order to enforce collection" will result in a bludgeoning by the court.

¹² Clark v. Associated Retail Credit Men, 105 F. 2d 62 (App. D.C. 1939).

¹³ Hill v. Kimball, 76 Tex. 210, 13 S.W. 59 (1890).

¹⁴ Harned v. E-Z Finance Co., 151 Tex. 641, 254 S.W. 2d 81 (1953).

¹⁵ _____ Tex. _____, 273 S.W. 2d 64 (1954).

Whether the earlier cases have been overruled remains to be seen. There remains an aura of doubt and uncertainty as well as an area of doubt and uncertainty. The key would seem to be that an allegation of small injury opens the "wide door," at least insofar as flagrant conduct is involved. It is unfortunate the court did not recognize the flagrant cases as a tort even though unaccompanied by physical harm. At any rate, the holding is distinctly a progressive step toward eliminating the requirement that all injuries be in some way tied on to the conventional tort categories.¹⁶

MISREPRESENTATION

Ever since the leading English case of *Peek v. Gurney*¹⁷ a problem in a misrepresentation case has been to whom the misrepresenter will be liable. A case on this point that should excite legal scholars was recently decided by the Texas court.¹⁸ There a real estate developer promised A he would landscape and beautify land opposite his lots. B was standing nearby and heard this. Relying on this information, B bought a lot from the developer, and instituted suit when the developer erected business buildings instead. Held, since the developer intended only A to act on the misrepresentation, he is liable only to A. Someone making a representation is accountable for its truth only to the very person whom he seeks to influence; no one else has a right to rely on it.¹⁹ Actually, the rule is based on policy rather than legal logic. The number of persons who might hear of the representation and act on it might be enormous and damages would be entirely out of proportion to the degree of fault. Accordingly it is usually held that there is no "transferred intent" in deceit cases.²⁰ But Dean Keeton suggests that a better view would hold the misrepresenter liable to those whom he could reasonably expect to rely on the statement.²¹ Dean Keeton believes that a subjective test as to intent of the misrepresenter necessarily involves difficult prob-

¹⁶ See Prosser: *Intentional Infliction of Mental Suffering; a New Tort*, 37 MICH. L. REV. 874 (1939).

¹⁷ 6 Eng. & Ir. App. 377 (1873).

¹⁸ *Westcliff v. Wall*,Tex., 267 S.W. 2d 544 (1954).

¹⁹ 2 COOLEY ON TORTS § 358 (4th ed. 1932).

²⁰ Accord: RESTATEMENT OF TORTS § 531.

²¹ Keeton: *The Ambit of a Fraudulent Representor's Responsibility*, 17 TEXAS L. REV. 1 (1939).

lems of proof. He also suggests the true reason for limiting liability is the difficulty of disproving reliance.

The early case of *Derry v. Peek*²² held that deceit will not lie unless the statement is made with the knowledge that it is false, without belief in its truth, or recklessly. Perhaps the majority of American courts accept the *Derry* case in name, but there has been much "judicial whittling" at the doctrine. In Texas, for example, negligence supplies the required scienter.²³ New Mexico recently had occasion to align itself with the increasing number of states that impose liability for either innocent or negligent misrepresentations in *Ham v. Hart*.²⁴ The defendant in that case did not make the misrepresentation knowingly, but spoke as of his own knowledge that a water well produced two gallons per minute (it actually only produced 1/2 gallon per minute). In sweeping language the court extended the doctrine of innocent misrepresentation from merely allowing rescission for it to awarding damages suffered therefrom, saying that good faith is immaterial if the plaintiff relies on the statement to his detriment. A person may not speak with "reckless disregard for the truth." Most legal writers attach little significance to whether the action is brought in negligence or deceit, so long as some sort of redress is provided. Procedural difficulties remain, however.²⁵

Can the plaintiff rely on the misrepresentation without any independent investigation on his own part? Yes, unless such reliance becomes foolhardy. The Oklahoma court so held in *Greene v. Humphrey*,²⁶ stating that the plaintiff is not precluded from recovery due to the fact that he had an opportunity to investigate the truth but did not do so. In holding that there is no duty to investigate the defect unless patently obvious, the court is squarely in line with the magic "majority rule."²⁷

²² 14 A.C. 337, 58 L.J. Ch. 864 (1889).

²³ See *Seale v. Baker*, 70 Tex. 283, 7 S.W. 742 (1888), which is still followed in Texas.

²⁴ N. M., 273 P. 2d 748 (1954).

²⁵ See Bohlen: *Should Negligent Misrepresentations be Treated as Negligence or Fraud?* 18 VA. L. REV. 703 (1932). Also 19 VA. L. REV. 742 (1933).

²⁶ Okla., 274 P. 2d 535 (1954).

²⁷ Accord: *Bishop v. E. A. Strout Realty Agency, Inc.*, 182 F. 2d 503 (4th Cir. 1950).

CONVERSION

Conversion traditionally has meant interfering with or controlling a chattel of another, i.e., acting like an owner when you are not the owner. A recent Arkansas case carried this concept to an extreme.²⁸ The plaintiff, owner of a store, disappeared with \$3,000 cash. His wife met with creditors of the store and agreed to run the business until all debts were paid. She made token payments from time to time, totaling \$338. Several years later the husband returned, claiming amnesia. Due to careless book-keeping by the wife, the accounts were then worthless. The husband sued the creditors on the novel theory that his wife had become the agent of the creditors and that, therefore, a constructive conversion of his book accounts took place due to the exercise of dominion over the accounts by the wife. The creditors, as principals, were held liable for \$5,000, and could find little solace in being allowed to retain the worthless accounts.

Granted that a book account may be a proper subject of conversion,²⁹ and that there may be a "constructive conversion" (as by locking a door on someone's chattel), still the decision deeply offends one's sense of justice. Why could not the court have found the plaintiff impliedly consented to his wife's taking over the accounts? Consent is a complete defense to an action for conversion, and consent is more readily implied in emergencies such as existed here than in normal situations. And before a master-servant relationship exists, there must be found that the conduct of the servant is subject to the control, or right to control, of the master.³⁰ The act of the defendants does not come under any of the traditional ways of committing conversion.³¹ At least the court is not completely hostile to creditors, as witnessed by three separate vigorous dissents.

NEGLIGENCE

Traditionally the concept of negligence has been confined to four distinct elements: (1) a duty to conform to a standard of

²⁸ *Plunkett-Jarrell Grocery v. Terry*, _____ Ark. _____, 263 S.W. 2d 229 (1954).

²⁹ *Accord: Englehart v. Sage*, 73 Mont. 139, 235 Pac. 767 (1925), involving conversion of a debt.

³⁰ *FERSON, PRINCIPLES OF AGENCY*, § 39 (1st ed. 1954).

³¹ See *PROSSER ON TORTS*, pp. 94-111 (1st ed. 1941).

conduct to protect others against unreasonable risks, (2) breach of that duty, (3) a causal connection between the conduct and the injury, and (4) actual damage. Each of the four elements is extremely important. One of the most interesting cases decided last year was concerned with the first element, *viz.*, duty. Truck driver A signalled with his rear lights for driver B to pass him. At the time driver A had on his dim lights and could see but twenty-five feet ahead. Driver B swung over to pass and hit the plaintiff, a pedestrian. Held, *driver A* may properly be found negligent for failure to have his bright lights on and subsequently signalling another to pass him.³² "One who assumes to act, even if gratuitously, may thereby become subject to a *duty to act carefully*, if he acts at all."³³ The case is analagous to the situation where a railroad has made a practice of stationing a flagman at a certain crossing, and when it fails to do so on one occasion is held liable to the motorist who has relied on the absence of warning.³⁴ Driver A's duty to the pedestrian was twofold: to drive carefully himself, and to avoid any affirmative act which would increase the pedestrian's danger. For breach of the second duty, driver A was held liable.

Troublesome problems arise as to just when a particular risk terminates. There are numerous cases holding that there is no liability for negligence on the part of a contractor when he has completed his work and it has been accepted by the party for whom it was done. Usually the reason given is that there is no privity of contract between the plaintiff, injured by the negligence of the contractor, and the contractor, or the intervening negligence of the party for whom the work was done insulated the contractor from liability to users of the contractor's work. In line with this view, the Arkansas court, in *Reynolds v. Manley*,³⁵ held that a road contractor was not liable in negligence to a car owner, after the contractor had completed the work and the state had accepted it, even though the car owner's injury is the proximate result of the contractor's failure to properly carry out his contract with the state (ruts and chugholes in road), unless the defect in construc-

³² *Haralson v. Jones Truck Line*,Ark....., 270 S.W. 2d 892 (1954).

³³ *Cardozo in Glanzer v. Shephard*, 233 N.Y. 236, 135 N.E. 275 (1922).

³⁴ *Erie R. Co. v. Stewart*, 40 F. 2d 855 (6th Cir. 1930). See another twist to the misfeasance theory in *Siegel v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 414 (1925).

³⁵Ark....., 265 S.W. 2d 714 (1954).

tion is so concealed that it could not have been detected after reasonable inspection. The true reason for decisions of this type is that courts realize they must terminate liability at some point, and they have arbitrarily chosen the point at which the work has been accepted by another.

The decision is out-of-step with the trend in a closely allied field—the “supplier-of-chattels” cases. There is a fast-growing tendency to cast words like “inherently dangerous to human life” into the legal ash-can and hold the manufacturer liable for negligently made chattels, without much regard as to whether the article is “inherently dangerous.”³⁶ And there are cases holding a contractor on the same footing as manufacturers.³⁷ There is good reason to suspect that a contractor will be liable to third persons after completion of his work and acceptance by the obligee in simple negligence without regard to such impressive phrases as “inherently dangerous” in the very near future. Foreseeability of harm will become the criterion, not the nature of the chattel.

In general, the owner of land is not liable to trespassers for harm caused by his failure to keep the land in a safe condition; nor is he under a duty to carry on his activities so as not to endanger them.³⁸ A nebulous, fine line marks the boundary line between a trespasser and a licensee, the latter being on the land with the express or implied consent of the owner. But a person may be a licensee or invitee as to a certain area of the land and a trespasser as to another. In *Burton Construction & Shipbuilding Co., Inc. v. Broussard*,³⁹ an ex-employee was an invitee as to entering a shed and removing his belongings, but he became a naked trespasser when he ventured 123 feet farther on the land to talk to a watchman. When paint fumes exploded and injured him in the latter area, the owner was held not liable. The owner did not owe the ex-employee even the duty of ordinary care, since the owner could not have reasonably anticipated that the ex-employee would enter the dangerous area. The owner would be liable to a trespasser only for willful, wanton acts, or for gross negligence.

³⁶ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

³⁷ See *Colbert v. Holland Furnace Co.*, 333 Ill. 78, 164 N.E. 162 (1928).

³⁸ Accord: RESTATEMENT OF TORTS § 333.

³⁹Tex.,..... 273 S.W. 2d 598 (1954).

It is ironical to note that the owner would be liable to someone walking down the street who might be injured by the blast under the doctrine of *Rylands v. Fletcher*,⁴⁰ yet completely absolved of duty toward an ex-employee on the premises talking to his watchman. It has been suggested that the reason for refusing to thrust any duty on the owner toward a trespasser is that the latter is contributorily negligent, or should not be able to recover for his own wrong. The better reason seems to be that it is sound policy to let a man use his own land as he sees fit without having to be on the lookout for intruders. Whatever the reason, the principal case is clearly in line with the overwhelming majority of courts.

CONTRIBUTORY NEGLIGENCE AS A DEFENSE

Contributory negligence has been defined as conduct on the part of the plaintiff which falls below the standard to which he is required to conform for his own protection.⁴¹ Many courts explain that the plaintiff's negligence is an intervening or insulating cause between the defendant's negligence and the result. Since the Industrial Revolution the defense of contributory negligence has been looked on with increasing disfavor. Ingenious devices have been invented to modify the doctrine. One of these is the "last clear chance" rule, which allows the plaintiff to recover even if he has been negligent himself if, just prior to the accident, the defendant had the superior opportunity to prevent it. The doctrine is generally recognized where the plaintiff is helpless to avoid the harm due to his prior negligence and the defendant, by using proper care, could have discovered the plaintiff in time to avoid harming him. The doctrine generally is not recognized where both parties were merely "inattentive." But the New Mexico court abolished the doctrine of contributory negligence for all practical purposes in *Merrill v. Stringer*.⁴² The court held the "last clear chance" doctrine may apply even where the plaintiff's negligence continued up to the time of the accident and the plaintiff could have extricated himself from his position of peril but was inattentive,

⁴⁰ L.R. 1 Ex. 265, L.R. 3 H.L. 330 (1886). See Bohlen: *The rule in Rylands v. Fletcher*, 59 PA. L. REV. 298 (1911). And c.f. *Turner v. Big Lake Oil Co.*, 96 S.W. 2d 221, 20 TEXAS L. REV. 399.

⁴¹ RESTATEMENT OF TORTS § 463.

⁴² _____ N. M., 271 P. 2d 405 (1954).

if the defendant should have seen the danger and could have avoided the accident if he had seen the danger. "Plaintiffs' lawyers" will immediately recognize the tremendous significance in each phrase of the new doctrine. Such a broad concept has not yet been adopted elsewhere.

Many states have adopted a variation of the "last clear chance" rule in the form of the "discovered peril" doctrine. Under this approach the defendant must have discovered both the plaintiff and the peril, and the defendant must have had a chance to avoid the accident. This is the prevailing view in Texas⁴³ and Arkansas.⁴⁴

Devices akin to the defense of contributory negligence remain, however, for the use and protection of the defendant, such as the fiction of "imputed" negligence. The fiction is employed with particular relish in most community property states, the theory being to prevent a negligent spouse from profiting as community owner for his own wrong. "Imputed" negligence in Texas is carried to an extreme: in a joint enterprise, negligence is imputed to all with a common purpose who have an equal right to control the vehicle; the negligence of the husband is imputed to the wife; the negligence of the bailee is imputed to the bailor to bar the latter's recovery; the negligence of the parent is imputed to the infant if the infant dies as a result of his injuries (due to peculiar wording in the death statute).⁴⁵ An Oklahoma case, *Muenzler v. Phillips*,⁴⁶ however, has gone to the opposite extreme. In that state, the negligence of the driver-husband is not imputed to the passenger-wife.⁴⁷ The wife, however, is within the rule requiring a guest to use ordinary care for his or her safety. In the *Muenzler* case the husband drove into a dangerous intersection without slackening his speed. There was high shrubbery on both sides of the road. The wife just sat and looked straight ahead without comment as to the reckless driving. Held, the question of the wife's negligence is entirely for the jury. Apparently the passenger-wife must do some affirmative negligent act, e.g., kicking her husband in

⁴³ See *Panhandle & S. F. Ry. Co. v. Napier*, 143 S.W. 2d 754 (1940).

⁴⁴ See 1 ARK. L. REV. 13 and generally 63 HARV. L. REV. 769.

⁴⁵ See generally 26 TEXAS L. REV. 461.

⁴⁶ _____ Okla., 276 P. 2d 221 (1954).

⁴⁷ *Stillwater Milling Co. v. Templin*, 182 Okla. 309, 77 P. 2d 732 (1938).

the shins or grabbing the wheel, before the court will rule as a matter of law that she has been negligent herself.

Probably none of the four elements of negligence excites the imagination of a student of the law more than the element of proximate cause and causation in fact. Where two causes concur to cause damage, many courts have adopted the "but for" rule, i.e., the defendant's conduct is not a cause if the event would have occurred without it. But where two causes concur to bring about an event, and either of them alone would have been enough to cause the same result, another test is needed. Suppose the defendant sets a fire which merges with a fire from another source; the combined fires burn the plaintiff's property, but either fire alone would have done the damage. Most courts would say the defendant's conduct was a *substantial factor* in injuring the plaintiff and hold him liable for the entire damage (jointly and severally). The Louisiana court apparently applied the latter test without identifying it by name in *Brantley v. Tremont & Gulf Railway Co.*,⁴⁸ which involved an action by a seller of bait against the railroad for cutting open a dam and letting his minnows escape. The seller of bait had a lease on the pond which housed the minnows. Heavy rains prompted railroad officials to cut the dam to prevent further damage to a nearby railroad embankment. The heavy rains continued after the cutting of the dam, however, and the railroad contended that the seller of bait would have sustained his loss anyway due to the more than seven inches of rainfall. Held, the action of the railroad was a substantial factor in causing the damage and the seller may recover for the entire damage, unmitigated by the damage which the subsequent rain would have caused anyway.⁴⁹

CONCLUSION

A careful digest of the leading tort cases for 1954 inevitably leads to the conclusion that the law in this field is undergoing a subtle transformation. The common law defenses are gradually

⁴⁸ _____ La. _____, 75 S. 2d 236 (1954).

⁴⁹ The Texas cases, however, have gone to an extreme in finding the damages capable of some sort of apportionment. See *Texas Coca Cola Bottling Co. v. Lovejoy*, 138 S.W. 2d 254 (Tex. Civ. App. 1940).

being shunted aside, and, to a certain extent, being replaced with doctrines long promulgated by "social engineers." A second consideration, however, will reveal latent dangers lurking beneath the surface. The courts may find more problems inherent in their "solutions" than they anticipated.

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